

FLEISCHMAN AND WALSH

ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

AARON I. FLEISCHMAN

FLEISCHMAN AND WALSH, P.C.

CHARLES S. WALSH

ARTHUR H. HARDING

STUART F. FELDSTEIN

RICHARD RUBIN

JEFFRY L. HARDIN

STEPHEN A. BOUCHARD

R. BRUCE BECKNER

ROBERT J. KELLER

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CHRISTOPHER G. WOOD

MATTHEW D. EMMER

JONATHAN R. SPENCER

DAVID D. BURNS

JILL KLEPPE McCLELLAND

STEVEN N. TEPLITZ

PETER T. NOONE*

ERIN R. BIRMINGHAM

EX PARTE OR LATE FILED

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1400 SIXTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

(202) 939-7900
FACSIMILE (202) 745-0916

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December 22, 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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VIA HAND DELIVERY

William F. Caton
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

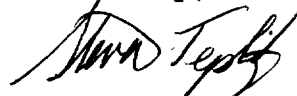
Re: GN Docket No. 93-252
Implementation of Section 3(n) and 332 of the
Communications Act

Dear Mr. Caton:

Transmitted herewith, on behalf of Bell Atlantic Mobile Systems, Inc. ("BAMS"), is a copy of a "Petition For Special Relief Concerning Enhanced Specialized Mobile Radio Applications And Authorizations" filed with the Commission today. The issues raised in this Petition are also relevant to issues raised in the above-referenced proceeding. Accordingly, BAMS respectfully requests that, in addition to its independent consideration, this Petition be included in the public record of the above-referenced proceeding.

Should there be any questions regarding this matter, please communicate directly with the undersigned.

Sincerely,



Steven N. Teplitz

Enclosure

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Before The
Federal Communications Commission
Washington, D.C. 20554

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DEC 22 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re:)
)
Bell Atlantic Mobile Systems, Inc.)
)
Petition For Special Relief)
Concerning Enhanced Specialized)
Mobile Radio Applications And)
Authorizations)

TO: The Commission

**Petition For Special Relief Concerning
Enhanced Specialized Mobile Radio Applications
And Authorizations**

In view of the pendency of various acquisitions and startups in the enhanced specialized mobile radio ("ESMR") business, Bell Atlantic Mobile Systems, Inc. ("BAMS"), by its attorneys, petitions the Commission to grant the relief set forth below.

First, ESMR service should immediately be classified as a commercial mobile service ("CMS"), without the benefit of the three year transition period extended to preexisting private mobile services in the Omnibus Reconciliation Act of 1993 ("Budget Act"), enacted on August 10, 1993.¹ ESMR service fails to qualify for the three year transition period because it was not being offered as a private service as of the required date, August 10, 1993.

Second, ESMR service providers should be required to offer equal access to all interexchange carriers on the basis of the proposed rules or conditions attached hereto.

¹Pub. L. No. 103-66, Title VI, §6002, 107 Stat. 312, 392 (1993). Section 6002(b)(2)(A) amends Sections 3(n) and 332 of the Communications Act of 1934, as amended, (the "Act") to create a comprehensive framework for the regulation of mobile radio services.

Alternatively, BAMS petitions the Commission to defer action on all pending and future applications for new or modified ESMR systems, or to condition such applications on the completion of the CMS rulemaking in GN Docket No. 93-252, and to consider therein the relief set forth above.

DISCUSSION

On August 10, 1993, the Budget Act was signed into law. In Title VI, Congress created a new regulatory class of mobile service - Commercial Mobile Service - to operate within a common carrier regulatory framework.² A three-year transition period was provided for private mobile services being provided as of August 10, 1993 that would become regulated as CMS as a result of the legislation.³ A review of the legislation, the Commission's Notice of Proposed Rulemaking in GN Docket No. 93-252, and the comments filed in response thereto clearly indicate that CMS includes ESMR service.⁴ As discussed below, legislative intent coupled with the lack of applicability to ESMR service of the three year transition period for private mobile services being provided as of August 10, 1993, requires the immediate classification and treatment of ESMR service

²Id.

³Section 6002(c)(2)(B).

⁴See Comments of Nextel Communications, Inc. at 14 (Nov. 8, 1993) ("As discussed above, existing Part 90 'for profit' services ... are commercial mobile services under the new statute, including any wide-area SMR or 'ESMR-type' systems...."); see also Comments of Motorola, Inc. at Appendix A (Nov. 8, 1993); Comments of Southwestern Bell Corporation at 16 (Nov. 8, 1993); Comments of NYNEX Corporation at 15 (Nov. 8, 1993).

as CMS.⁵

In relevant part, Section 6002(b)(2)(A) of the Budget Act contains a new road map for the regulatory treatment of mobile services. The unequivocal intent behind Section 6002 is to create regulatory parity among mobile services.

This section amends section 332(c) to provide that services that provide equivalent mobile services are regulated in the same manner. It directs the Commission to review its rules and regulations to achieve regulatory parity among services that are substantially similar. In addition, the legislation establishes uniform rules to govern the offering of all commercial mobile services. Uniform rules are needed to ensure that all carriers providing such services are treated as common carriers under the Communications Act of 1934.⁶

Congress further noted that regulatory parity was necessary because "under current law, private carriers are permitted to offer what are essentially common carrier services, interconnected with the public switched telephone network, while retaining private carrier status."⁷ In particular, the legislative history clearly demonstrates awareness by the Congress that separate regulatory schemes are inconsistent with the degree of convergence exhibited between commercial private and common carrier mobile services.

Functionally, these "private" carriers have become

⁵BAMS requests that this Petition also be made part of the record in the follow proceedings: Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Notice of Proposed Rulemaking, FCC 93-454 (rel. Oct. 8, 1993), and Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Notice of Proposed Rulemaking, 8 FCC Rcd 3950 (1993). The issues raised in this Petition directly impact these ongoing Commission proceedings.

⁶H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. at 259. (1993).

⁷Id.

indistinguishable from common carriers but private land mobile carriers and common carriers are subject to inconsistent regulatory schemes.⁸

The Commission is addressing the legislative directive to create regulatory parity in its ongoing rulemaking in GN Docket No. 93-252.

In order to ease the disruption that a sudden change of regulatory structure might have on entrenched private land mobile services that were being provided under an altogether different regulatory scheme, Congress established a limited exemption for these services. In relevant part, Section 6002(c)(2)(B) requires that:

any private land mobile service provided by any person before such date of enactment . . . shall be treated as a private land mobile service until three years after such enactment.

The plain language of the legislative exemption to the immediate reclassification of qualified private mobile services as CMS clearly limits the applicability of the three year transition period to those private land mobile services that were already being provided before the enactment of Section 6002(c)(2)(B).

The Commission has expressly recognized the meaning of this legislative language:

Specifically, private licensees providing service prior to August 10, 1993 . . . will continue to be treated as private mobile service providers for three years after the date of enactment. Budget Act, §6002(c)(2)(B).⁹

Importantly, Congress made the actual provision of service prior to

⁸Id. at 259-260.

⁹Notice at n.3.

enactment to be determinative. Neither the date on which the Commission adopted rules or policies governing a service nor the date on which licenses were first issued has any relevance for purposes of determining whether the exemption is applicable.

While SMR service has been in existence since 1978, ESMR service is a distinct and relatively new phenomenon, first authorized in 1991¹⁰ and first provided in late August, 1993.¹¹ ESMR networks are often described as an advancement over SMR systems in the same way that cellular systems were first described as an advancement over Domestic Public Land Mobile Radio Service systems. That is, they offer substantial improvements in capacity, clarity and coverage areas. As originally described by NexTel, ESMR systems will use digital land mobile communications technology and employ frequency reuse in a low-power, multiple base station configuration.¹² Using Time Division Multiple Access multiplexing technology, these systems would achieve at least a fifteen fold increase in the capacity of the existing SMR systems. According to NexTel, "the individual low-power base stations will be operated

¹⁰The concept of a ESMR system was first thrust into the limelight by Fleet Call, Inc. (now NexTel Communications, Inc. ("NexTel")) in its April 5, 1990 request for Commission approval of applications for assignment of SMR licenses and for waivers of certain Commission Rules to authorize the creation of ESMR systems in the following markets: Chicago, Dallas, Houston, Los Angeles, New York and San Francisco. The Commission authorized NexTel's ESMR systems in 1991. See Fleet Call, Inc., 6 FCC Rcd 1533 (1991).

¹¹"NexTel Activates Digital Mobile Network," Reuters, Limited, August 31, 1993; "NexTel Activates Los Angeles Digital Mobile System," Business Wire, August 31, 1993.

¹²Fleet Call, Inc. April 5, 1990 filing at 16.

through a centralized switching facility providing seamless 'hand-off' of communications on mobile units moving throughout the ESMR service area."¹³ The Commission has referred to ESMR systems as advanced spectrally efficient networks that increase system capacity and permit seamless end user 'roaming' among many transmitter sites.¹⁴

As the Commission readily acknowledges, ESMR networks are vastly different from the single-transmitter SMR facilities that until recently dominated the commercial private land mobile radio service. Digital technology, sophisticated switching capabilities, frequency reuse and seamless roaming are only some of the distinguishing features of these new networks. These networks have effectively been made possible by the Commission's attempt to regulate their emergence through flexible interpretation and/or waiver of private land mobile radio rules that were intended to regulate the much simpler single-transmitter SMR facilities. At the same time, the Commission has continued to prohibit the licensing of SMR facilities to wireline telephone companies.

The ad hoc approach to authorizing ESMR networks was quickly overwhelmed by the rapid consolidation of SMR facilities into such networks in many geographic areas. In fact, the industry has effectively imploded with entities having waivers swallowing each other. At the forefront of this feverish aggregation of SMR channels are NexTel throughout the country, Dial Page Ltd. in the

¹³Id.

¹⁴8 FCC Rcd at 3953.

southeast and Cencall, Inc. in the Rocky Mountain and Pacific Northwest regions. Although a rulemaking to facilitate the development of ESMR networks was recently undertaken,¹⁵ the Commission's regulatory foresight has left much to be desired in this area. Nextel has already emerged as a formidable competitor to cellular service providers, in part by purchasing or joint venturing with other prospective ESMR service providers who had already consolidated SMR facilities in self-selected geographic areas pursuant to waivers granted by the Commission.

ESMR networks are viewed as direct competitors to cellular systems and PCS networks.¹⁶ Indeed, in filings with the Securities and Exchange Commission, Nextel (nee Fleet Call) has stated that it "will compete with established cellular operators in its efforts to attract mobile telephone customers, dealers and resellers in each of the markets in which [it] will operate a Digital Network."¹⁷ Nonetheless, ESMR providers operate under a very different and much less burdensome regulatory scheme than cellular service providers.

¹⁵Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Notice of Proposed Rulemaking, 8 FCC Rcd 3950 (1993) (proposed creation of a new Expanded Mobile Service Provider category on 800 MHz SMR channels of service to Basic Trading Areas or Major Trading Areas).

¹⁶See e.g., "Digital Stirs Into The Cellular Stew; Technology: New Mobile Systems Will Handle More Calls And Claim To Have Better Sound. But Phones Are Incompatible," Los Angeles Times, Business Section, p.1, November 26, 1993; "Dark Horse Nextel Looks For A Winning Line - A Look At A Company Making An Impact In The US Cellular Telephone Sector," Financial Times, November 12, 1993.

¹⁷Fleet Call, Inc., Form S-1, filed at the Securities and Exchange Commission on October 18, 1991 at 7.

For example, unlike cellular service providers, ESMR operators are statutorily exempt from the requirements of Title II of the Act. These rules require, among other things, that rates be just, reasonable and not unreasonably discriminatory.¹⁸ Similarly, ESMR providers are statutorily exempt from rate and entry regulation by the States, at the same time their cellular competitors have these additional regulatory burdens.

In sum, ESMR service is clearly CMS and should be immediately classified as such. It is equally clear that ESMR is a new service, distinct from traditional SMR, which is not eligible for the three-year transition period because it was not being provided as of the required August 10, 1993 date. In keeping with the statutory directive and intent, regulatory parity requires that the Commission immediately classify ESMR service as CMS and defer action on any pending applications to establish or modify ESMR systems until the regulatory structure for CMS has been implemented. In the alternative, all authorizations for new or modified ESMR systems should be conditioned on the resolution of the regulatory status issues currently being addressed in GN Docket No. 93-252.

BAMS also urges the Commission to impose equal access

¹⁸While it is true that wide area SMR networks may not "resell" interconnected telephone service by "marking up" their cost of interconnection with the public switched telephone network, their freedom in setting flat or usage sensitive rates for the usage of their channels more than compensates for that restriction.

obligations on ESMR providers.¹⁹ In the alternative, the Commission should condition new or modified ESMR system authorizations on the provision of equal access to interexchange carriers. As the Commission is aware, it is not the only rule maker in the regulatory arena affecting commercial mobile service providers. In particular, the Modification of Final Judgment ("MFJ") requires BAMS and the other Bell Operating Companies ("BOCs") to offer "equal access" to all interexchange carriers. Traffic which crosses a Local Access Transport Area boundary must, with some geographic exceptions permitted by the MFJ court, be handed off to the interexchange carrier selected by the subscriber.

Although BAMS's cellular affiliates provide equal access to their cellular subscribers, their cellular competitors (except for affiliates of other BOCs) do not. Until the MFJ court removes the equal access requirement for BOC cellular carriers, it is demonstrably counter to the public interest for customers of all mobile providers not to have the choice that customers of BOC carriers have. Moreover, it is clearly in the public interest that the Commission ensure that all commercial mobile service providers compete under the same requirements, even if it is not responsible for imposing the requirements in an uneven manner.

All CMS providers, including ESMR providers, should be subject

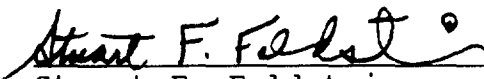
¹⁹In its comments in response to the Notice, BAMS urged the Commission to grant, as part of that rulemaking, a Petition for Rulemaking (RM-8012) filed by MCI Communications requesting the imposition of equal access obligations on all cellular carriers. That Petition, which was cited by the Commission in the Notice, received nearly universal support for comprehensive equal access. Notice at n.94.

to equal access requirements that place them in competitive parity with existing BOC cellular affiliates. To this end, in its comments in GN Docket No. 93-252, BAMS has urged the Commission to adopt rules designed to extend equal access obligations to all commercial mobile service providers. These rules, as applied to ESMR providers, are outlined in Exhibit A hereto.

Wherefore, BAMS urges the Commission to immediately (a) classify ESMR service as CMS within the meaning of Title VI of the Budget Act, without the benefit of the three year transition period extended to private mobile services being already being provided as of August 10, 1993; and (b) require ESMR service providers to offer equal access to all interexchange carriers on the basis of the proposed rules or conditions attached hereto. Alternatively, BAMS requests that the Commission defer action on all pending and future applications for new or modified ESMR systems, or to condition such applications on the completion of the CMS rulemaking in GN Docket No. 93-252, and to consider therein the relief set forth above.

Respectfully submitted,

**BELL ATLANTIC MOBILE
SYSTEMS, INC.**

By: 
Stuart F. Feldstein
Richard Rubin
Steven N. Teplitz

Its Attorneys

Fleischman and Walsh
1400 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 939-7900
December 22, 1993/11741

EXHIBIT A

Equal Access Proposed Rules

RULE ONE: Each Enhanced Specialized Mobile Radio ("ESMR") provider shall offer to all interexchange carriers exchange access and exchange services for such access on an unbundled basis, that is equal in type, quality, and price to that provided to any interexchange service provided by such ESMR provider or an affiliate thereof.

RULE TWO: For purposes of the equal access requirement imposed in RULE ONE, wireless exchange areas shall be deemed to be coterminous with the exchange areas established in the MFJ as modified in subsequent waivers.

RULE THREE: Each ESMR provider must offer unaffiliated IXC's the opportunity to interconnect with the provider either by access tandem connection or by direct connection.

RULE FOUR: No ESMR provider may discriminate between an interexchange service provided by the ESMR provider itself or an affiliate thereof, and any other interexchange carrier in the:

- (a) establishment and dissemination of technical information and interconnection standards;
- (b) interconnection and use of the ESMR providers' service and facilities or in the charges for each element of service;
- (c) provision of new services and planning for an implementation of the construction and modification of facilities used to provide exchange service;

RULE FIVE: Each ESMR provider must notify all interexchange carriers on a nondiscriminatory basis of planned changes to existing network services or the addition of new services that affect the interexchange carriers' interconnection with the ESMR provider's network.

RULE SIX: All customers of a ESMR provider will be free to choose among participating interexchange carriers. All existing and new customers of providers will be sent a ballot and asked to choose an interexchange carrier from among participating interexchange carriers. Each such ESMR provider will list those interexchange carriers

in a nondiscriminatory manner and will periodically rotate the listing on a nondiscriminatory basis to ensure that each interexchange carrier has a random chance of being listed at the top of the list. Customers who fail to choose an interexchange carrier will be allocated among interexchange carriers in the same proportion as customers who return their ballots.

RULE SEVEN: Every ESMR provider is required to inform each new customer that the customer has a choice of interexchange carriers. Such ESMR provider may not, at the time of establishment of service and the initial choice of interexchange carrier by the customer, recommend the ESMR provider's own interexchange service over that of an unaffiliated carrier. If a new customer requests additional information concerning any interexchange service offering, including the ESMR carrier's own interexchange service, the ESMR provider will provide the customer, on a nondiscriminatory basis, with any literature provided by, or with the phone number of, the interexchange carrier or carriers about which the customer has requested more information. Subject to the limitation on direct marketing to existing customers noted below, however, nothing in this rule will preclude a provider from otherwise advertising and promoting the ESMR provider's interexchange service in connection with its local ESMR service.

RULE EIGHT: After a customer's initial selection of an interexchange carrier, the personnel of a ESMR provider may actively market the ESMR provider's interexchange services to its customers. However, the ESMR provider may use customer names, addresses, and mobile numbers to market its interexchange service only if it provides that information on the same terms and conditions to unaffiliated interexchange carriers, subject to a written agreement by each interexchange carrier that it will use the information only to market that carrier's interexchange services to the ESMR provider's customers.